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# THE INTERNATIONAL ANTI–BRIBERY ACT OF 1998

JULY 30, 1998.—Ordered to be printed

Mr. D'AMATO, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

## REPORT

### INTRODUCTION

On June 25, 1998, the Committee on Banking, Housing, and Urban Affairs, reported an original bill, S. 2375 the "International Anti-Bribery Act of 1998," to amend the Foreign Corrupt Practices Act of 1977 ("FCPA") to implement the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Committee voted 18–0 to report the legislation to the Senate.

### HISTORY OF THE LEGISLATION

In the wake of the Watergate scandals, the Securities and Exchange Commission discovered that many public companies were maintaining cash "slush funds" from which illegal campaign contributions were being made in the United States and illegal bribes were being paid to foreign officials. Subsequently, scandals involving payments by U.S. companies to public officials in Japan, Italy, and Mexico led to political repercussions within those countries and severely sullied the reputation of American companies throughout the world.

In response, Congress passed the Foreign Corrupt Practices Act of 1977 (the "FCPA"). Through this Act, the United States declared its policy that American companies should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices. The FCPA amended the Securities Exchange Act of 1934 to require issuers covered under that Act to maintain transparent books and records and pro-

vided for civil and criminal penalties. In addition, the FCPA required both issuers and all other U.S. nationals and companies (defined as "domestic concerns") to refrain from making any unlawful payments to public officials, political parties, party officials, or candidates for public office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, for the purpose of obtaining or retaining business.

Since the passage of the FCPA, American businesses have operated at a disadvantage relative to foreign competitors who have continued to pay bribes without fear of penalty. Such bribery is estimated to affect overseas procurements valued in the billions of dollars each year. Indeed, some of our trading partners have explicitly encouraged such bribes by permitting businesses to claim them as tax-deductible business expenses.

It is impossible to calculate with certainty the losses suffered by U.S. businesses due to bribery by our foreign competitors. The Commerce Department has stated that it has learned of significant allegations of bribery by foreign firms in approximately 180 international commercial contracts since mid-1994, contracts that were valued at nearly $80 billion. This legislation, coupled with implementation of the OECD Convention by our major trading partners, will go a long way towards leveling the playing field for U.S. businesses in international contracts.

In 1988, Congress directed the Executive Branch actively to seek to level the playing field by encouraging our trading partners to enact legislation similar to the FCPA. These efforts eventually culminated in the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). Thirty-three countries, comprising most of the significant trading countries in the world, signed this Convention in Paris in December 1997. This Convention was forwarded by the President to the Senate on May 1, 1998.

The OECD Convention calls on all parties to make it a criminal offense "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." It further calls on all parties to assert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, to assert nationality jurisdiction.

This Act amends the FCPA to conform it to the requirements of and to implement the OECD Convention. First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce him to do or omit to do any act. The Act expands the FCPA's scope to include payments made to secure "any improper advantage," the language used in the OECD Convention.

Second, the OECD Convention calls on parties to cover "any person"; the current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic con-

cerns." The Act, therefore, expands the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

Third, the OECD Convention includes officials of public international organizations within the definition of "public official." Accordingly, the Act similarly expands the FCPA's definition of public officials to include officials of such organizations.

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad. It is within the constitutional grant of power to Congress to "regulate Commerce with foreign Nations" and to "define and punish * * * Offenses against the Law of Nations." U.S. Const. art. 1, § 8, cl. 3 & 10.

Fifth and finally, the Act amends the FCPA to eliminate the current disparity in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies. In the current statute, foreign nationals employed by or acting as agents of U.S. companies are subject only to civil penalties. The Act eliminates this restriction and subjects all employees or agents of U.S. businesses to both civil and criminal penalties.

## SECTION-BY-SECTION

*Section 1. Short title.*

*Section 2. Amendments relating to issuers of securities.*

Section 2(a) implements the OECD Convention by amending § 30A of the Securities Exchange Act of 1934 to prohibit any payments made to foreign officials, foreign political parties, party officials, and candidates, directly or through other persons, for the purpose of securing "any improper advantage." See OECD Convention, Art. 1, ¶ 1.

Section 2(b) implements the OECD Convention by amending § 30A(f)(1) to expand the definition of "foreign official" to include an official of a public international organization. See OECD Convention, Art. 1, ¶ 4(a). Public international organizations are then defined by reference to those organizations designated by Executive Order pursuant to the International Organizations Immunities Act (22 U.S.C. § 288).

Section 2(c) implements the OECD Convention by creating a new additional basis for jurisdiction over foreign bribery by U.S. issuers and U.S. persons that are officers, directors, employees, or agents, or stockholders or such issuers. See OECD Convention, Art. 4, ¶ 2. This section extends coverage for acts outside the United States to U.S. issuers that are organized under the laws of the United States or of a State, territory, or commonwealth, or a political subdivision thereof and U.S. persons acting on such issuers' behalf.

Under the new § 30A(f), U.S. issuers or U.S. persons acting on a U.S. issuers' behalf violate the FCPA if they make any of the pay-

ments prohibited under the existing statute outside of the United States, irrespective of whether in doing so they make any use of the mails or means or instrumentality of interstate commerce. Although this section limits liability to U.S. issuers and U.S. persons acting on U.S. issuers' behalf, it is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of U.S. issuers for acts taken on their behalf by their officers, directors, employees, agents, or stockholders outside the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.

Section 2(c) also inserts references to the new offense in the provisions of the existing statute governing exceptions and affirmative defenses.

Section 2(d) implements the OECD Convention by amending § 32(c) of the Securities Exchange Act of 1934 to eliminate the current disparity in treatment between U.S. nationals that are employees or agents of issuers and foreign nationals that are employees or agents of issuers. Presently, foreign nationals who are employees or agents (as opposed to officers or directors) are subject only to civil sanctions. Eliminating this preferential treatment implements the OECD Convention's requirement that "[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person to [make unlawful payments]." In addition, section 2(d) provides that the same penalties shall apply to issuers for violation of the new provisions for acts outside the United States as apply to violations of the existing statute.

*Section 3. Amendments relating to domestic concerns*

Section 3(a) implements the OECD Convention by amending § 104(a) of the FCPA (15 U.S.C. § 78dd–2(a)) to prohibit any payments made to foreign officials, foreign political parties, party officials, and candidates, directly or through other persons, for the purpose of securing "any improper advantage." See OECD Convention, Art. 1, ¶ 1.

Section 3(b) implements the OECD Convention by amending § 104(h)(2) of the FCPA to expand the definition of "foreign official" to include an official of a public international organization. See OECD Convention, Art. 1, ¶ 4(a). Public international organizations are then defined by reference to those organizations recognized by Executive Order pursuant to the International Organizations Immunities Act (22 U.S.C. § 288).

Section 3(c) implements the OECD Convention by creating a new additional basis for jurisdiction over foreign bribery by U.S. persons. See OECD Convention, Art. 4, ¶ 2. This section limits coverage to businesses organized under the laws of the United States, a State, territory, possession, or commonwealth, or a political subdivision thereof, or U.S. nationals. U.S. nationals are defined by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101 (22), which defines a "national of the United States" as "(A) a citizen of the United States, or (B) a person, who though not a citizen, owes permanent allegiance to the United States." Under the new § 104(h), a U.S. person violates the FCPA if it makes any of the

payments prohibited under the existing statute outside of the United States, irrespective of whether in doing so it makes any use of the mails or means or instrumentality of interstate commerce. Although this section imposes liability only on U.S. persons, it is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of U.S. businesses for acts taken on their behalf by their officers, directors, employees, agents or stockholders outside the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder. Section (3)(c) also inserts references to the new offense in the provisions of the existing statute governing exceptions, affirmative defenses, and injunctive relief.

Section 3(d) implements the OECD Convention by eliminating the current disparity in treatment between U.S. nationals that are employees or agents of domestic concerns and foreign nationals that are employees or agents of domestic concerns. Presently, foreign nationals who are employees or agents (as opposed to officers or directors) are subject only to civil sanctions. Eliminating this preferential treatment implements the OECD Convention's requirement that "[e]ach Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person to [make unlawful payments]." In addition, section 3(d) provides that the same penalties shall apply to U.S. persons for violation of the new § 104(h) for acts outside the United States as apply to violations of the existing FCPA.

Section 3(e) is a technical amendment to delete unnecessary language from the definition of 11 routine governmental action. The term is not used in paragraph (1) of subsection (h) and this language is not used in the otherwise identical definition in § 30A(f)(3)(A) (redesignated by this Act as § 30A(g)(3)(A)).

*Section 4. Amendment relating to other persons*

Section 4 creates a new section in the FCPA providing for criminal and civil penalties over persons not covered under the existing FCPA provisions regarding issuers and domestic concerns. This section closes the gap left in the original FCPA and implements the OECD Convention's requirement that Parties criminalize bribery by "any person." OECD Convention, Art. 1, ¶ 1. The prohibited acts are the same as those covered by § 30A(a) and § 104(a) with two qualifications.

First, the offense created under this section requires that an act in furtherance of the bribe be taken within the territory of the United States. The OECD Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory." OECD Convention, Art. 4, ¶ 1. The new offense complies with this section by providing for criminal jurisdiction in this country over bribery by foreign nationals of foreign officials when the foreign national takes some act in furtherance of the bribery within the territory of the United States. It is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of foreign businesses

for acts taken on their behalf by their officers, directors, employees, agents or stockholders in the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.

As envisioned by the negotiators, Congress intends that the "territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." See Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary) at ¶ 24. Further, "territory of the United States" should be understood to encompass all areas over which the United States asserts territorial jurisdiction. See 18 U.S.C. § 5 ("The term 'United States', as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."); 18 U.S.C. § 7 (special maritime and territorial jurisdiction of the United States; 49 U.S.C. § 46501(2) (special aircraft jurisdiction of the United States).

Although this section limits jurisdiction over foreign nationals and companies to instances in which the foreign national or company takes some action while physically present within the territory of the United States, Congress does not thereby intend to place a similar limit on the exercise of U.S. criminal jurisdiction over foreign nationals and companies under any other statute or regulation.

The second difference from the existing FCPA provisions is that this section expands the commerce nexus to include not only the use of the mails or any means or instrumentality of interstate commerce but "any other act" within the United States. It is the view of Congress that any act committed by a foreign national within the United States that is in furtherance of a bribe paid to a foreign official falls within the Congress' power to regulate "Commerce with foreign Nations." U.S. Const., Art. 1, sec. 8, cl. 3.

Finally, section 4 defines "covered person", as used in this section, to mean any natural person other than a U.S. national and any business organized under the laws of a foreign nation or a political subdivision thereof.

## REGULATORY IMPACT STATEMENT

This legislation is designed to implement the recently signed OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States has been urging other industrialized countries to observe principles similar to the provisions of the Foreign Corrupt Practices Act. Once adopted, the Convention will establish an international regime of ethical conduct in business transactions. The Committee believes that this legislation will have little or no regulatory impact.

## CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Congressional Budget Office estimates that implementing this legislation would not result in any significant cost to the federal government. Because enactment of the bill could affect direct spending and receipts, pay-as-you-go procedures would apply. How-

ever, CBO estimates that any impact on direct spending and receipts would not be significant.

The legislation is excluded from the application of the Unfunded Mandates Reform Act (UMRA) under section 4 of that act, because it would amend the Foreign Corrupt Practices Act (FCPA) in ways that are necessary to implement the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Section 4 of UMRA excludes from the application of that act any legislative provisions that are necessary for the ratification or implementation of international treaty obligations.

## CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirement of subsection 12 of rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

# APPENDIX

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U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
*Washington, DC, May 4, 1998.*

Hon. ALBERT GORE, Jr.,
*President, U.S. Senate,*
*Washington, DC.*

DEAR MR. PRESIDENT: Enclosed herewith is a draft bill, the "International Anti-Bribery Act of 1998," which contains legislative proposals to implement the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). This Convention was forwarded by the President to the Senate on May 1, 1998, for its advice and consent.

Administrations of both parties have long urged our trading partners to criminalize bribery of foreign public officials by their nationals, as the United States did in 1977 in the Foreign Corrupt Practices Act of 1997 (the "FCPA"). These bipartisan efforts finally succeeded when thirty-three countries signed the OECD Convention in Paris in December of last year. The OECD Convention, when fully implemented by all parties, will help create the level playing field and transparent contracting long sought by American businesses as they compete around the world for public contracts.

The OECD Convention calls on all parties to make it a criminal offense "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." It further calls on all parties to exert territorial jurisdiction broadly and, where consistent with national legal and constitutional principles, nationality jurisdiction.

The draft bill would amend the FCPA to conform to the requirements of and to implement the OECD Convention. First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce him to do or omit to do any act in order to obtain or retain business. The bill would make explicit that payments made to secure "any improper advantage," the language used in the OECD Convention, are prohibited by the FCPA.

Second, the OECD Convention calls on parties to cover "any person." The current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The bill would, therefore, expand coverage to include all for-

eign persons who commit an act in furtherance of a foreign bribe while in the United States.

Third, the OECD Convention includes officials of public international organizations within the definition of "public official." Accordingly, the bill similarly expands the FCPA definition of public officials to include officials of such organizations.

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction over offenses committed abroad when consistent with national legal and constitutional principles. Accordingly, the bill would provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.

Fifth and finally, the bill would amend the penalties applicable to employees and agents of U.S. businesses to eliminate the current disparity between U.S. nationals and non-U.S. nationals employed by or acting as agents of U.S. companies. In the current statute, such non-U.S. nationals are subject only to civil penalties. The bill would eliminate this restriction and subject all employees or agents of U.S. businesses to both civil and criminal penalties.

The International Anti-Bribery Act would affect receipts (new criminal fines) and direct spending (outlays from the Crime Victims Fund (CVF)). Therefore, it is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act. Receipts from fines would be deposited into the CVF and could be spent in the following year. Thus, direct spending from the CVF would match the deposits into the CVF with a one-year lag. Our preliminary estimate is that the net effect of the enrolled bill on the deficit will be less than $500,000 annually. This proposal should be considered in conjunction with all other proposals that are subject to the pay-as-you-go requirement.

With respect to potential impacts on the criminal justice system, the bill imposes new criminal penalties on two classes of persons: (a) foreign nationals employed by or acting as agents of U.S. companies, and (b) foreign nationals and foreign companies that engage in unlawful acts in the U.S. In addition, the liability of U.S. persons is expanded to the extent that unlawful acts taken wholly outside the United States will now result in the small penalties as those taken within the United States under the existing statute.

It would be appreciated if you would lay this draft bill before the Senate. An identical proposal has been transmitted to the Speaker of the House of Representatives.

The Office of Management and Budget has advised that there is no objection to the presentation of this proposal to the Congress from the standpoint of the Administration's program.

Sincerely,

ANN M. HARKINS,
*Acting Assistant Attorney General.*

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